Supreme Court, U.S.
FILED
AUG 12 2002
OFFICE OF THE CLERK

(2)

No. 02-56

IN THE

Supreme Court of the United States

JOSEPH M. DeMAURO

Petitioner,

v.

ANNETTE B. DeMAURO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. The Proceeding Below

In February 1994 Annette B. DeMauro ("Ms. DeMauro" or "Respondent"), the Respondent, filed a divorce action in the Superior Court in Rockingham County, New Hampshire ("Trial Court") against Joseph M. DeMauro ("DeMauro" or "Petitioner"), the Petitioner here. During the eight years of the action, DeMauro has been found to be in contempt of the Trial Court's orders on numerous occasions (L-35, L-36, L-38, L-39).* Numerous arrest warrants have been issued for DeMauro. A capias remains outstanding (L-39) and DeMauro is a fugitive from the New Hampshire Court system.

DeMauro was previously jailed for non-payment of support (L-33) and $503,900 in bail was set, which he posted within 24 hours (L-26). DeMauro remains in contempt to this day for non-payment of support and alimony, now amounting to over $1 million.

In a companion action in the Middlesex Superior Court in Massachusetts, DeMauro has been found in contempt for refusing to appear for a Court ordered deposition, and a capias remains outstanding (L-41, L-42). DeMauro remains a fugitive at large on that capias.

By Order dated November 25, 1998, the Trial Court found DeMauro in contempt for non-payment of support, and for an unexplained refusal to execute financial release forms consistent with *Doe v. United States*, 487 US 201 (1988) and as required by *DeMauro v. DeMauro*, 142 NH 879 (1998). See App. 72.

DeMauro has failed to state that portion of the record which conclusively refutes the contention in his Petition

* References "L__" are to a Lodging submitted herewith.

(P-12) that he was not in contempt. The New Hampshire Supreme Court held:

> "While he [DeMauro] disputes whether the trial court ever found him in contempt for failing to execute these waivers, our review of the record indicates that he was found in contempt."

DeMauro v. DeMauro 794 A.2d 112, 116 (N.H. 2002). *See also* A.7.

Trial in this matter commenced on November 15, 1999. DeMauro failed to appear for trial without explanation and while in contempt. *DeMauro II* at App. 7. He was defaulted, and all allegations of he Complaint taken as confessed (App. 90).

DeMauro did not present any expert at trial to challenge the calculations, basis, or methodology of Ms. DeMauro's expert witness and certified public accountant, Ronald Ouelette. The CPA's report was based upon income and expenses testified to by Ms. DeMauro at trial (e.g. L-5, L-6, L-7) and was further supported with copies of checks showing income (e.g. L-5, L-6, L-7), and numerous documents verifying expenses (e.g. L-8, L-6, L-19, L-21, L-24), facts which DeMauro failed to disclose in his Petition.

DeMauro falsely states in the Petition that the Oulette report was manipulated by Counsel to "seem reasonable" (P-10) while including an incorrect reference to Appendix Page 89 in support of the false allegation.

DeMauro falsely states (P-12) in the Petition that the New Hampshire Supreme Court allowed evidence to supplement the record on appeal "which confirmed that there was no outstanding contempts" against DeMauro. DeMauro

was and remains in contempt to this day, and a fugitive at large (L-39).

B. Factual Background — Ms. DeMauro's Restatement.

Respondent Ms. DeMauro states the following errors and omissions in the "factual background" presented by the Petitioner, in addition to those noted elsewhere in this response.

a) DeMauro was ordered to file a financial affidavit by the Rockingham County Superior Court on 7/19/95 (L-47). He did not claim the Fifth Amendment in response. Instead he refused to comply without explanation[1].

b) Later, in September of 1995, DeMauro asserted the Fifth Amendment through counsel in a hearing to compel him to file a financial affidavit or to be incarcerated until he did so[2]. At that time, no RICO action had been discussed. DeMauro's basis for asserting the Fifth Amendment has shifted over time to suit his purposes, while the record below has been manipulated and misstated in his Petition.

c) DeMauro did not refuse to sign the *Doe* releases as a result of asserting the Fifth Amendment as claimed on page 9 of the Petition, incorrectly referencing Appendix page 92 as support for this falsehood[3]. The "reason" he refused is

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1. The Order (L-47) required compliance in 45 days. DeMauro did not seek any extension, he refused to comply.

2. Fortuitously, DeMauro was in NH at the time, on trial in another matter, which, when he lost, became the subject of another arrest warrant (L-40).

3. Appendix page 92 is a portion of the Divorce Decree which simply notes that DeMauro refused to sign the waivers. It provides no reason for the refusal, as DeMauro gave none.

wholly a creature of his petition for certiorari, created in retrospect, and was presented no where below.

d) Contrary to DeMauro's assertion on page 9 of his Petition, he was indeed found in contempt for refusing to sign the *Doe* releases, as noted both by the Trial Court and the New Hampshire Supreme Court. Please see App. 92 , (defendant refused to sign authorizations) and App.7 where the New Hampshire Supreme Court notes that although DeMauro disputes that he was found in contempt, he indeed was in contempt.

e) DeMauro claims that his refusal to sign the Doe waivers did not prejudice Ms. DeMauro as the waivers signed by the Receiver were just as effective as his own would have been (P-9). This falsehood flies in the face of the unrebutted testimony of the Receiver (L-119-122) and the documents the Receiver presented at trial (L-27). The Trial Court characterized the response from DeMauro's Swiss Banks to the request for information lacking his signature as the "take a hike letter" (L-27). Specifically the letter from DeMauro's Swiss Bank, Credit Agricole Suez states:

> . . . the authorization given to you by Receiver J.P. McGee which is based on a U.S. Court Order cannot have any direct effect whatsoever in Switzerland as a consent and release to give information on Mr. DeMauro's assets . . .

(L-27). Thus the assertion by DeMauro that there was "no prejudice" at trial because he refused to sign the *Doe* releases is contradicted by the record, and amounts to only the misrepresentation of his counsel.

In addition DeMauro proposes a new rule of law developed for his convenience — one who defies a Court order is exonerated unless the innocent Party undertakes the burden of demonstrating prejudice resulting from the defiance.

f) Ms. DeMauro provided her expert with data taken from marital and business records she had seen between 1979 to the time of trial. Ms. DeMauro presented numerous records to the Trial Court, including checks showing income from the foreign construction business (L-5, L-7), purchase and sale agreements for real property (L-21), compilations of expenditures from checkbooks (L-24), an affidavit detailing income and expenses (L-9), and recent admissions made to her by DeMauro (L-9, L-93-94).

g) From the time *DeMauro I* was decided, Ms. DeMauro was paid nothing for support by DeMauro. The $440,000 referred to by DeMauro as paying up his support arrearage (P-11) was instead Ms. DeMauro's own money from the sale of a Florida home. DeMauro claimed no interest in the Florida property during this proceeding. Indeed, DeMauro literally refused to admit that he owned so much as a set of golf clubs (App. 42). Now that the trial is over, he asks this court to purge his contempt by sweeping aside the orders and findings of the courts of New Hampshire and — without even a scintilla of testimony — determine that he owned all of the Florida home and it was "his" money that Ms. DeMauro received.

h) Even if the Court below had taken the sale of the Florida home as a marital asset in which DeMauro shared[4],

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4. The Divorce Decree holds that Ms. DeMauro may apply all of the Florida property to her $35 million in property division, and thus none of its proceeds would be credited to back support, let alone half or all of it. (Divorce Decree, App-95).

at most his share would have been 50%, leaving a deficiency of $220,000 in back support. Thus the contempt would not be "purged", but a $220,000 deficit remaining even under his own inaccurate assumptions. The Trial Court correctly did not credit DeMauro with any payment at all (since it was not his money), and he provides no explanation for why the arrest warrant for non support was renewed and is still outstanding (L-39) if his view of the proceedings below is correct. DeMauro provides no record reference or documentation that the $440,000 paid included any of his money, let alone being all his money.

i) The New Hampshire Supreme Court did not "question" that DeMauro was in contempt during oral argument as falsely stated by the Petitioner. The "question" merely asked what the record would show, and the Court concluded after its review of the record, that DeMauro was indeed in contempt, App. 7. His contempt at time of trial was conceded by his attorney in her closing argument (L-115).

C. The Opinion of the NH Supreme Court in *DeMauro II*.

DeMauro's appeal to the New Hampshire Supreme Court raised no issues of "due process" or the Fifth Amendment and thus such claims are waived here[5]. DeMauro's Notice of Appeal specified five grounds (App. 77). One issue involved assignment of Social Security benefits under 42 U.S.C. § 407(a). Another cited adjustment of rights under the Internal Revenue Code, 26 U.S.C. 215. A third claimed that rights of

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5. DeMauro instead asks for extraordinary relief — that his failure to raise these issues below, here created in retrospect, be overlooked "in the interests of justice". See Petition, FN 9, page 25. He provides no extraordinary reason for his failure to raise the issues below, while represented by numerous law firms.

"parties" not before the Court had been "adjusted"[6]. The second allegation of DeMauro's appeal (App.-77, ¶ 2) suggested that the Trial Court had mis-read *DeMauro v. DeMauro*, 142 NH 879 (1998) [*DeMauro I*][7]. Another allegation of the appeal (stated first in paragraph 1 on App.-77), claims that DeMauro was "punished" because the Trial Court made evidentiary rulings (i.e. allowing testimony by Ms. DeMauro's certified public accountant) with which DeMauro disagreed.

In *DeMauro I* the New Hampshire Supreme Court held that DeMauro *must* execute financial waivers consistent with those approved in *Doe v. United States*, 487 U.S. 201 (1988). *DeMauro I* (see App.-49) then held:

> Having asserted his privilege [the defendant] cannot be heard to argue that the disposition was unequal when [the defendant] has effectively prevented the trial court . . . from being able to determine whether the disposition was equal or not.

Defendant did not ask for reconsideration of *DeMauro I*, and yet now complains about an unequal distribution. Neither did DeMauro appeal the Trial Court's Order that he sign *Doe* waivers — he simply refused to sign[8]. In addition,

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6. DeMauro failed to specify how his rights were effected by the claimed "adjustment" or the basis of his standing to assert claimed rights of parties he believed not to be before the Court.

7. DeMauro incorrectly concludes that *DeMauro I* had somehow vested him with a blanket immunity allowing him to ignore all orders of the Rockingham County Superior Court.

8. Given the outstanding contempt and capias for non payment of spousal support, and prior incarceration for defiance of a prior Order, Mr. DeMauro avoids New Hampshire and therefore the Trial Court was not able to procure his arrest for refusing to sign *Doe* waivers.

immediately upon the issuance of *DeMauro I* in June of 1998, Defendant stopped paying any support to Ms. DeMauro, and was subsequently found in contempt and a capias issued (L-36, L-37, L-39). The contempt and arrest warrant remain outstanding to this day (L-39), and DeMauro continues to this day to fail pay any court ordered support or alimony. Indeed, DeMauro boasts that Ms. DeMauro will never receive anything: "a threat which has proven to be all too accurate to date". (Divorce Decree, at App.- 92). The Trial Court's Order of $20,000/month is a "continuing order", which ripened into alimony at the same rate on 2/4/00 pursuant to the Divorce Decree (App-93, 98). Petitioner DeMauro's interlocutory appeal of the temporary support order was rebuffed by the NH Supreme Court (L-48). Therefore, DeMauro was still in contempt at the time the appeal was heard by the NH Supreme Court, still in arrears in support, and an arrest warrant was, and is, still outstanding (L-39).

Following *DeMauro I*, the First Circuit dismissed the RICO action against DeMauro (App. 14). Subsequently, a Massachusetts companion action filed in the Massachusetts Superior Court stripped DeMauro of much of his claim of "self incrimination" and ordered him to answer specific financial questions at a deposition (L-77, 84). The decision was upheld by the Massachusetts Court of Appeals (L-43). Nevertheless, DeMauro refused to appear for the court ordered deposition. He was found in contempt, and a capias is outstanding (L-42, L-41). Likewise in a related Rockingham County Case (#92-C-1486, *D'Auria v. DeMauro*), a capias was issued when DeMauro refused to appear for examination on assets and refused to pay a $600,000 judgment[9]. See L-40. Thus, DeMauro has universally demonstrated a contempt for any court process or order save those to his liking (L-33), and continues as the

9. DeMauro refused to appear, and did not cite the Fifth Amendment. He chose to be a fugitive on this warrant as well.

Rockingham County Superior Court found "to thumb his nose at this court and the judicial system" (L-35).

DeMauro refused, without offering any explanation whatsoever, to execute the *Doe* releases authorized by *DeMauro I* and ordered by the Trial Court. The Receiver appointed by the Trial Court testified at trial that DeMauro's refusal to sign the *Doe* waivers resulted in his "Swiss Banks" refusing to release any financial information, and produced exhibits to verify this assertion (L-27, L-119-122). The New Hampshire Supreme Court, in *DeMauro II*, specifically held that DeMauro's actions constituted a deliberate choice to disregard a trial court order with a direct bearing on the very issue he sought to appeal (i.e the determination of the magnitude of marital assets to be divided), thus materially interfering with the Trial Court's determination of the issue (*DeMauro II*, App-7). DeMauro's claim that he need not have signed the *Doe* releases because the Receiver appointed by the court later signed them was not presented to the Trial Court or the New Hampshire Supreme Court, and is entitled to no consideration here. Even if such argument had been made below, it is of no avail to justify defiance which materially impeded discovery — and indeed was calculated to impede discovery (App-7, App. 92).

Contrary to the Statement of the Case advanced by Petitioner (P-5) DeMauro has not paid back support. Ms. DeMauro was allowed to receive $440,000 of her own money from the sale of the Florida home, with the entire balance of several million dollars being held in escrow to be redistributed only upon the theoretical possibility that the then pending decision of the New Hampshire Supreme Court led to a new trial which theoretically could have led to a contrary division of marital assets. The release of funds did not purge DeMauro of contempt, and the Court has renewed the capias for DeMauro each time it was requested to. DeMauro tries here to assert his ownership of the funds from

the sale of the Florida home while simultaneously using the Fifth Amendment as a shield against discovery of any asset. There is no finding anywhere that any of the funds paid to Ms. DeMauro belonged to Joseph M. DeMauro, let alone all of them. The Trial Court and the New Hampshire Supreme Court have found otherwise (App.-7, 92). Petitioner's misrepresentation of the record seeks both to conceal from this Court the currently outstanding capias against him, or to explain why the Trial Court issued the current capias if DeMauro is not in contempt. To DeMauro, the currently outstanding capias (L-39) is simply another inconvenient portion of the record to be ignored.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONSTITUTIONAL RIGHT TO APPELLATE REVIEW WHERE A LITIGANT HAS NOT BEEN DENIED DUE PROCESS IN THE TRIAL COURT.

A. A party such as DeMauro who has actively and consciously defied court orders material to the discovery process required for trial, who has failed to pay Court ordered support, who failed to attend trial without explanation, who is a fugitive at large on a New Hampshire capias (L-39), and who was nevertheless allowed to present evidence and cross examine witnesses at trial, was not denied due process and has no due process right to an appeal.

Neither New Hampshire nor federal law guarantees an automatic right of appeal. *State v. Cooper*, 127 N.H. 119, 489 A.2d 1209 (1985). We further agree that an appeal is mandated if due process was wholly absent at the trial court level. With four attorneys from three different law firms present to represent his interests, having cross examined all of Ms. DeMauro's witnesses, having presented witnesses of

his own, and having made numerous trial objections, many of which were sustained, DeMauro's real problem with the Trial Court is that he disagrees with the result. DeMauro does not want to pay Ms. DeMauro anything and has, as the trial court found:

> The court further finds and rules that the defendant [DeMauro] has indicated to the plaintiff that unless she accedes to his offers for the payment of alimony and division of marital property, she will never receive anything from him and that he would continue, with the aid of his vast financial resources, to avoid service of process and arrest . . .

No "new rule" was fashioned by the New Hampshire Court in *DeMauro II* which will accrue to the detriment of litigants generally, as claimed by DeMauro (P. 16). Although dismissal of an appeal because of a defendant being in contempt of a trial court's orders in the civil context was a matter of first impression for New Hampshire, such a result is hardly novel for the states generally or in federal courts.

> [i]t is well settled that this court has the inherent power to dismiss an appeal by a party who has refused to comply with the Orders of the Trial Court.

TMS., Inc. et al. v. Aihara, 83 Cal. Rptr. 2d 834, 834-835 (1999). *See also Knoob v. Knoob*, 192 Cal. 95 (1923). *National Union of Main Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954).

II. THE NEW HAMPSHIRE TRIAL COURT FOLLOWED *DEMAURO I*. MR. DEMAURO ATTEMPTED TO TAKE THE BENEFITS OF *DEMAURO I* WHILE CHOOSING TO DEFY THAT PART OF THE HOLDING NOT TO HIS LIKING. HE RECEIVED FULL DUE PROCESS RIGHTS AT TRIAL.

A. The Fifth and Fourteenth Amendments' guarantee of Due process was honored both by the New Hampshire Trial Court and the New Hampshire Supreme Court in *DeMauro II*.

1. DeMauro received due process at trial.

"Due process" has been defined as the right to be heard, to present evidence and to cross examine witnesses, *Goldberg v. Kelly*, 397 U.S. 254 (1970). DeMauro was afforded all of these rights and had four lawyers from three separate law firms attend the trial to protect his rights. All of Ms. DeMauro's witnesses were cross examined extensively by DeMauro's attorneys. He was allowed to present evidence and called witnesses. His numerous law firms chose not to present any expert witness to rebut the conclusions of Ms. DeMauro's financial expert or to challenge the reasonableness, methodology, or basis of his calculations.

2. The Trial Court did not disregard any rule of evidence because DeMauro asserted his Fifth Amendment privilege. The Trial Court properly exercised its discretion and DeMauro never appeared at trial to assert the Fifth Amendment privilege or anything else.

Since DeMauro never appeared at trial, he cannot claim his "Fifth Amendment" rights were violated at trial. DeMauro provides no logical nexus between his assertion of the Fifth

Amendment at the discovery stage of the proceeding and his claim of being denied due process at a trial he failed to attend. DeMauro claims that the Trial Court violated his due process rights by disregarding the common law rules of evidence (P-17) incorrectly citing Appendix pages 70-71 in support of this contention. No portion of the record even inferentially demonstrates that the Trial Court disregarded any rules of evidence, and that claim was never made in DeMauro's Notice of Appeal to the N.H. Supreme Court in *DeMauro II* (App.-77).

DeMauro apparently claims instead that the admission of evidence that he considers "remote and speculative" somehow constitutes ignoring "common law" rules of evidence. Trial judges in New Hampshire, especially in domestic relations proceedings, are given wide discretion concerning the admissibility of evidence. *Gosselin v. Gosselin*, 136 N.H. 350,353, 616 A.2d 1287 (1992); *In Re Thayer*, 146 N.H. 342, 777 A.2d 845 (N.H. 2001). Likewise the determination of whether evidence is "too remote" is a matter for the broad discretion of the trial court, *United States v. Maryland and Virginia Milk Pro. Ass'n.*, 20 F.R.D. 441, 442 (1957). Such a determination depends on the facts of each case as evaluated by the trial judge in context. *Maryland and Virginia Milk Pro. Ass'n*, held as relevant financial data that was 10 years old on certain claims, and declaring that a "much longer time is suitable" on other claims (*supra* at 443).

There is nothing in *Key Bank of Maine v. Latshaw*, 137 NH 665 (1993) which establishes any "bright line" test or rule that financial evidence in a domestic relations proceeding must be excluded if any of its basis is more than three years old. The question in *Lawshaw* involved the circumstances under which it was reasonable for *Lawshaw* to refuse to answer questions as providing a link in a chain leading to a criminal prosecution. *Latshaw* held that the Fifth Amendment

would not shield Defendant Latshaw from answering questions about his financial condition as it existed more than three years prior to the trial. Indeed, if DeMauro's reading of *Latshaw* is correct, then *DeMauro I* itself overruled *Latshaw* since *DeMauro I* allowed DeMauro to assert the Fifth Amendment in order to conceal his entire financial history going back to the 1970's. A three year "bright line" test, if established by *Latshaw*, puts *Lawshaw* squarely at odds with the later decided *DeMauro I*. If such a "three year bright line" test exists, then DeMauro should have produced in discovery all financial records of his economic condition before November 15, 1996 — three years before the commencement of the trial, and certainly those more than three years older than his original assertion of the Fifth Amendment in September of 1995. Of course, he produced no such records, claiming *DeMauro I* as his shield to hide all records back to 1975, while here attempting to use *Lawshaw* to declare as irrelevant records more than three years old[10].

Here the question is the relevancy of financial testimony offered in the context of a domestic relations proceeding designed to divide martial assets — an entirely different issue than the theoretical criminal prosecution which was the subject of *Latshaw*. In New Hampshire the trial court is given broad discretion to determine issues of relevancy. *Bohan v. Ritzo*, 141 NH 210, 679 A. 2d 597 (1996). Ms. DeMauro's expert testified to his calculations of the net worth of marital assets, clearly an issue relevant to the division of those assets as required by RSA- 458:16a. Once the threshold determination is made that the expert's testimony is relevant, the weight to be given to the expert's testimony is for the trier of fact. In a decision under Federal Rule 703 (identical to the New Hampshire Rule) the First Circuit held:

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10. [This footnote omitted]

> (the effect of Rules 703 and 705 is to 'place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross examination . . . the fact that an expert's opinion may be tentative or even speculative does not mean that the testimony must be excluded so long as opposing counsel has an opportunity to attack the expert's credibility

Intern. Adhesive Coating v. Bolton Emerson Intern., 851 F. 2d 540, 545 (1st Cir. 1988).

Intern Adhesive Coating then notes (*Id.* at 545), consistent with New Hampshire practice, that the underpinning of an expert's testimony is a question of weight and credibility to be resolved by the trier of fact. DeMauro's contention that *Latshaw* established what would amount to a new rule of evidence in New Hampshire — that in all contexts financial information more than three years old is irrelevant by definition (i.e a "bright line test") would if accepted, mean that the New Hampshire Supreme Court intended to overrule an entire history of granting broad discretion to trial court judges in the domestic relations context, without ever once mentioning in the decision that such a sweeping application was intended, and with no scholarly publication in the State having thus far commented on the historic change. At most DeMauro asserts misapplication of the rule of relevance. Under Supreme Court Rule 10, such a claim "rarely" results in granting certiorari.

3. Distribution of marital assets as required by R.S.A. 458:16a, was based upon unrebutted calculations of an expert certified public accountant. His testimony was based upon abundant data supplied from the personal knowledge of witnesses and documents which the Trial Court was entitled to believe.

Ms. DeMauro provided her expert accountant with a wealth of factual data from which his calculations were derived. First she provided an affidavit, based upon her personal knowledge of the income and expenses of the marriage throughout its term (L-9). She testified that the information in the affidavit came from examination of records, checkbooks, bank statements, invoices, and numerous other supporting materials. She testified that her data also came from discussions with DeMauro himself in which he recently boasted about the marital assets exceeding $150 million (L-98). This testimony was found as a fact by the trial Judge (Divorce Decree, App-92).

Ms. DeMauro's expert was never cross examined about whether the information he obtained from Ms. DeMauro was of the type generally relied upon by those in his profession to make the calculations he made. Such a cross examination question would be one of the "facts and assumptions" which underlie the expert's testimony. Proper cross examination is "squarely on the shoulders of opposing counsel", *Intern Adhesive Coating, supra* at 545. Additionally, DeMauro had ample opportunity to present an expert to claim that Ms. DeMauro's information was so outrageous as to preclude any proper calculation of marital assets (i.e not the type commonly relied on in the profession). Having failed to present an expert, and having failed to conduct a proper cross examination into the basis of the CPA's report, DeMauro here proffers the post trial opinion of counsel concerning what documents and data should have been the foundation of a

meaningful financial calculation. The financial calculations presented by Ms. DeMauro's expert need not even have been based upon evidence which would itself have been admissible. N.H. Rule of Evidence 703; *Brewster v. State*, 107 N.H. 226, 219 A. 2d 706 (1966).

Distilled to its essence, Petitioner DeMauro's argument amounts to nothing more than his belief that the Trial Judge should not have credited Ms. DeMauro's testimony. Such a frivolous contention is not the proper grist of certiorari. Knowing this DeMauro offers instead a convoluted and incomprehensible claim that because he asserted the Fifth Amendment during discovery a consequently "biased" Trial Judge denied him "due process" at a trial for which DeMauro, without explanation, refused to appear.

4. The Divorce Decree was supported by ample evidence, including DeMauro's admission of $150 million in assets.

Ms. DeMauro testified concerning her examination of numerous records of the marital assets, including bank accounts, credit card bills, checkbooks, purchase and sale agreements, and distribution checks from the construction business in which she worked as an employee. She also testified about numerous conversations with DeMauro concerning extent of the marital assets (e.g, L-92-L95). Here there is unrebutted testimony that DeMauro destroyed boxes of records precisely so that they would not be available for trial (L-99). There is testimony and a finding that DeMauro threatened Ms. DeMauro that if she did not accept his settlement proposals, that she would not receive a dime (App.-92, 96). DeMauro boasted to Ms. DeMauro that he would:

> starve you [Ms. DeMauro] out. To starve you to the point that you will get on your knees and crawl to me begging

(L-96). While demanding that Ms. DeMauro drop her New Hampshire case and go to the Dominican Republic for a divorce (L-96-97), there is testimony and a finding that DeMauro admitted and indeed bragged that the net worth of the marriage was in excess of $150 million (L-98), Divorce Decree App.-92). This admission took place within the three years prior to trial and therefore is competent evidence even under DeMauro's unfathomable convolution of the *Latshaw* holding.

Ms. DeMauro testified as to her specific memories of the income of the marriage. Further, she created a chart of yearly income and expenses which was based both upon her examination of extensive records including bank accounts, checkbooks, business distribution checks, certificates of deposit, bills, invoices, purchase agreements for real property, records concerning the renovation of the property, credit card statements and so on. Numerous such records were introduced at trial (L-2-3) as was Ms. DeMauro's chart compiling them (App. 88). The rates of return on the invested marital cash were the subject of expert testimony, but no rate utilized by Ms. DeMauro's expert reached the levels that DeMauro bragged that he earned (L-93). DeMauro may therefore claim that the rates of return utilized constituted "speculation", but any imagined "speculation" was solely to his benefit. Assuming *arguendo*, DeMauro's position, from his own mouth he is not prejudiced, he is benefited. Such an argument is unavailing, *State v. Weeks*, 667 A. 2d 1032 (N.H. 1995).

Defendant simply does not like the findings that the Trial Court made. He does not agree that Ms. DeMauro's testimony should have been credited by the Trial Court. Disagreement over findings of fact do not remotely begin to rise to the level of certiorari. Therefore DeMauro obfuscates by attempting to draw an illogical nexus between DeMauro's assertion of the Fifth Amendment during pre-trial discovery

and the admission of evidence during a trial DeMauro failed to attend.

5. There is no evidence that the trial judge was biased against DeMauro, and the issue was not raised by DeMauro below and is thus barred here absent extraordinary circumstances.

All of the claimed errors in admissibility of evidence presented here were argued to the New Hampshire Supreme Court. DeMauro asserts "bias" only based upon his disagreement with "evidentiary rulings". Since the same evidentiary rulings argued here were known when the appeal to the New Hampshire Supreme Court was filed, why was not the "bias" of the trial judge argued there ? DeMauro cites only *Bracy v. Gramley*, 520 U.S. 894, 899 117 S. Ct. 1793, 1794 (1997) in support of his "bias" claim. However, *Bracy* involved the corruption of the judicial process resulting from the taking of bribes by the trial judge. The only "bias" shown in the Trial Court here was the bias Petitioner's Counsel Morrissey exhibited by "making faces" at the judge's rulings, and thus winning his admonition and exclusion from the proceedings due to a lack of decorum during the trial (L-109).

Claiming that disagreement over evidentiary rulings is only a "nuance" different from the bribery noted in *Bracy* (see App.-23) is typical of the grotesque exaggerations offered as support for this Petition.

III. THE SANCTION OF DISMISSAL OF DEMAURO'S APPEAL IS WELL JUSTIFIED BY HIS CONTEMPT OF TRIAL COURT ORDERS. THE DISMISSAL HAD ABSOLUTELY NOTHING TO DO WITH DEMAURO'S ASSERTION OF THE FIFTH AMENDMENT DURING DISCOVERY.

A. The Trial Court's rulings at trial did not involve DeMauro's assertion of the Fifth Amendment during discovery.

The Defendant opines by way of self serving conclusion that Ms. DeMauro's evidence was "too remote" under his mistaken view of the *Latshaw* holding, and then leaps to the allegation that admission of such "too remote" evidence was a "punishment" and "bias" for DeMauro's belated assertion of the Fifth Amendment during discovery[11]. DeMauro concedes that his use of the Fifth Amendment during discovery entitled the Court to draw an adverse inference against him (P-24), but for his own assumption that Ms. DeMauro's hours of testimony concerning their assets was not "probative". The United States Supreme Court is thus again asked to question the findings of a New Hampshire trial judge when the New Hampshire Supreme Court found no need to do so.

Another flaw in DeMauro's argument is that the Trial Court nowhere in the Divorce Decree states that its findings are based upon any "adverse inference" against DeMauro taken as a result of his assertion of the Fifth Amendment. Its findings are instead based upon the evidence introduced

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11. DeMauro would have the court believe that he asserted the Fifth Amendment as a result of a RICO case being filed, while leaving unexplained why he claimed the Fifth Amendment in a hearing before the Superior Court in September of 1995 — well before he ever heard of the RICO case, and by that September hearing had already ignored two court orders to file a financial statement.

at trial, and the allegations of the complaint, taken pro-confesso, because DeMauro made the voluntary choice not to appear for trial[12].

B. DeMauro was in contempt at the time of trial, was in contempt at the time of appeal, and is in contempt now, all as found by the Rockingham County Superior Court and the Hew Hampshire Supreme Court. That factual finding may not be re-litigated here. DeMauro "consistently and deliberately" ignored Trial Court orders, and continues to do so.

The Divorce Decree found as a fact that DeMauro is contempt for his refusal to sign authorizations (App. 92). The only "authorization" that DeMauro was asked to sign was the *Doe* release. The New Hampshire Supreme Court also found that DeMauro was in contempt for his refusal to sign the *Doe* releases despite his assertion (App. 7). It further found that DeMauro's contempt had a direct bearing on the outcome of the case and that the contempt was conscious and deliberate. (App. 7).

Supreme Court Rule 10 states that certiorari will be "rarely" granted when the claim is based on an asserted error

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12. DeMauro insists that he was not in contempt, but fails to explain why he would chose to not attend trial if he was not in contempt and thus did not fear being arrested. His counsel makes the feeble excuse that Mr. DeMauro had nothing to contribute to the trial given his claim of the Fifth Amendment, but there are dozens of non financial questions that he could have been asked, and of course he could have assisted his four attorneys in his own defense. Of course, he could have been forced to sign the *Doe* financial waivers at trial or been incarcerated for his refusal. Since this was a non jury trial, it would have been very easy to postpone the close of evidence to see if Mr. DeMauro's Swiss Banks ignored his own directive to disclose assets. Mr. DeMauro instead chose the path of stonewalling the Trial Court in favor of attempting to sell himself as the "victim" on appellate review.

in factual findings. DeMauro says he was not in contempt. The Trial Court and the New Hampshire Supreme Court *both* say he was. No extraordinary circumstance is shown to justify sweeping the requirements of Supreme Court Rule 10 aside to "re find" facts in the face of a still outstanding capias (L-39) the existence of which Defendant fails to explain. Defendant is nothing more than a fugitive at large from the New Hampshire court system, *State v. Patten*, 134 N.H. 319 (1991).

C. No "opportunity to cure" can fix DeMauro's contempt, as the trial is over, and to order a new trial would reward DeMauro with a "second chance" as a result of his conscious and deliberate defiance of the Trial Court.

Obviously DeMauro did not like the outcome of the divorce trial that he chose not to attend. His view is that the Trial Court should have awarded Ms. DeMauro half of the assets she could find by the time of trial, and left the decree open in the event that she ever found anything else. DeMauro suggests that the proper method of protecting Ms. DeMauro's rights to an equitable division of marital assets under New Hampshire Law is not to require his compliance with valid court discovery orders, but instead to send Ms. DeMauro on the fool's errand of chasing assets around the globe, through foreign countries where discovery is prevented by law (e.g. Switzerland, Lichtenstein, and other "tax havens").

Indeed the Trial Court found, and DeMauro conceded by his non appearance and default that:

> The defendant [DeMauro] has been engaged in a continuing and calculated effort to conceal the true extent of his business and personal assets by

> investing monies in off-shore accounts and in various foundations formed in foreign jurisdictions, (Divorce Decree, App.-92.).

Ms. DeMauro and the Court Receiver saw how utterly ineffective pursuit of these accounts would be as is demonstrated by the letter the Trial Court characterized as the "take a hike" letter from a Swiss bank (L-119-120). The Trial Court further characterized DeMauro's actions in spiriting away the marital assets as "all to the detriment and prejudice of the Petitioner" [Ms. DeMauro], (Finding A-4, App. 100). DeMauro's conscious choice of contempt impeded the trial and was an integral part of his strategy: (a) refuse to pay support to "starve" his spouse and diminish her ability to prosecute her claim (L-96) ; (b) take the Fifth Amendment to refuse to provide financial data; (c) file an interlocutory appeal on every issue possible so as to delay trial[13]; (d) when arriving at the trial his tactics delayed, claim that the only available financial information is stale, and stonewall any court order with the possibility of locating fresh information.

DeMauro's refusal to sign *Doe* releases prior to the trial cannot be "cured" with any offer to sign them months and years after the trial or indeed in the trial of a different case. The time at which the information would have been useful was long past when this trial commenced. Unhappy with the result of trial, DeMauro now seeks to utilize his own contempt to leverage a new trial and a "second chance". Such a position does not merit consideration — it merits sanctions under Supreme Court Rule 42[14]. If DeMauro has

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13. Indeed, although Defendant has not sought in this court or the N.H. Supreme Court, a stay of the New Hampshire Supreme Court's decision, he is utilizing the mere existence of this Petition to oppose release of escrowed funds to Ms. DeMauro, to her continued prejudice.

14. A separate motion for sanctions will be filed.

the slightest interest in "curing" his contempt of the Rockingham County Superior Court, he would pay the over $1 million in back support he now owes under existing court orders[15].

IV. THE NEW HAMPSHIRE SUPREME COURT MADE NO "NEW RULE" IN *DEMAURO II*, BUT FOLLOWED A LONG LINE OF PRECEDENT INVOLVING APPELLANTS WHO SEEK RIGHTS WHILE THWARTING THE PROCESS OF TRIAL. COURTS HAVE THE INHERENT POWER TO PROTECT AND POLICE THEIR JUDICIAL SYSTEMS.

A. DeMauro *assumes* that he was denied due process by the Trial Court, then argues by "bootstrapping" that he requires an appeal to review the due process he was denied. Courts have long had the inherent power to discipline litigants who show contempt for their processes. Dismissal of an appeal as a result of a contempt in the trial court has long been approved. *McKane v. Durston*, 153 U.S. 684 (1894); *National Union of Marine Cooks and Stewards v. George Arnold*, 348 US 37 (1954); *Henderson v. Henderson*, 329 Mass. 257 (1952). Courts may dismiss an action for refusing to obey discovery rules, let alone the repeated and continuing contempt up to this very day, shown here by DeMauro. *Meyer v. Wolvos*, 707 N.E.2d 1029 (1999).

B. On page 28 of his Petition DeMauro falsely states that there is no contempt order outstanding. The clear record is otherwise (App.-7, 92). The capias for DeMauro remains outstanding (L-39). He owes over $1 million in back support. DeMauro does not have the right to thwart trial discovery by

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15. Please see Divorce Decree, App.- 98, parag. 18. In addition, add $20,000/m through July, 2002 = $1,020,000.

ignoring clear orders (App. 7), then when he does not like the outcome of the trial, seek a new trial based upon his own contempt of court.

C. DeMauro refused to pay support as ordered. He paid not a dime after the ruling in *DeMauro I.* He refused to sign releases authorized by the New Hampshire Supreme Court and made not a word of protest below about the wording of those releases, which now so troubles him. After impeding and obstructing the trial in every manner possible including refusing to even attend trial, DeMauro here seeks a new trial since he did not like the outcome of the first one. DeMauro seeks an "opportunity to cure" when he had months to "cure" before trial and chose not to. What remedy does DeMauro propose? Does he promise to pay Ms. DeMauro the $20,000/ month in temporary support while we wait for a new trial and his next inevitable appeal? Does he promise to appear and answer questions if the New Hampshire Court in a new trial follows its Massachusetts sister court and determines that there is no longer any reason remaining to assert the Fifth Amendment? Does he say that he will repay all the legal costs of the trial and the appeal that his refusal to obey court orders occasioned? Does he offer a bond for the $35 million judgment should he lose again? No. His remedy is to provide Ms. DeMauro nothing[16], to continue to carry out his promise to insure that she receives as little as possible until she finally succumbs to his well funded legal onslaught exactly as he has intended since the start of this action in 1994 (App.-92, L-96-97). The dismissal by the New Hampshire Supreme Court was entirely proper and thoroughly earned by DeMauro's continuing contempt and obstructionism.

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16. Indeed DeMauro has attempted to stall release of funds to Ms DeMauro from the sale of the Florida property even after the N.H. Supreme Court dismissal, and without seeking any stay — utilizing the mere filing of their Petition here as an argument to prevent Ms DeMauro from receiving funds.

CONCLUSION

DeMauro has stated nothing in his Petition which remotely satisfy the standards of Supreme Court Rules 10(a), (b), (c). He is a fugitive from an outstanding capias who currently owes over $1 million in back support. The Petition should be dismissed.

Respectfully submitted,

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